Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures	)	WT Docket No. 05-211

REPLY COMMENTS OF VERIZON WIRELESS

Verizon Wireless hereby submits its Reply Comments in the above-captioned proceeding[1] to oppose a proposal for a spectrum aggregation limit – a spectrum cap – applicable to the Advanced Wireless Services Auction ("AWS Auction").[2] In its opening comments, Verizon Wireless challenged the proffered competition-based policy justification for a designated entity ("DE") eligibility restriction denying bidding credits to otherwise qualified DEs that have a "material relationship" with "large in-region incumbent service providers."[3] As Verizon Wireless explained, such a restriction would not address, let alone resolve, the Commission's stated concerns about the DE program but would conflict with its consistent findings on CMRS competition.[4]

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[1] Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Further Notice of Proposed Rulemaking*, WT Docket No. 05-211, FCC 06-8 (rel. February 3, 2006) ("Further Notice").

[2] Comments of Leap Wireless International, Inc. (filed Feb. 24, 2006) ("Leap comments") at 5 and 6.

[3] Comments of Verizon Wireless (filed Feb. 24, 2006) ("Verizon Wireless comments") at 6-12.

[4] *See* Verizon Wireless comments at 6-7.

Leap's proposal that the Commission adopt a one-time spectrum cap for the AWS Auction is a procedurally defective and substantively meritless attempt to hijack this proceeding and transform it into a full-blown reconsideration of spectrum aggregation limits. Leap's proposal is essentially an untimely petition for reconsideration of a 2001 order removing the spectrum cap and a 2003 order rejecting spectrum aggregation limits in the AWS Auction, and goes far outside the limited scope of this rulemaking. It can be dismissed as procedurally defective on these bases alone. But even were the proposal timely, Leap fails to demonstrate a change in competitive conditions that warrants revisiting the Commission's decision to sunset the spectrum cap. Indeed, as recently as September the agency held that the CMRS market is effectively competitive.[5] To the extent Leap cites to the Commission's recent wireless merger orders to claim concentration in the CMRS market, those authorities are misused – a systemic problem with Leap's comments.[6] In each of those cases, agency consent to the proposed transaction was based on a finding that, with limited conditions, the transaction was consistent

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[5] Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Tenth Report*, FCC 05-173, 20 FCC Rcd. 15908 (rel. Sept. 30, 2005) ("2005 CMRS Competition Report") at ¶ 207.

[6] For example, Leap cites Commissioner Jonathan Adelstein as suggesting that consolidation in the CMRS market, and access by only a limited number of entities to spectrum for 3G, could "impose an economic, cultural, and political agenda" on the public. Leap comments at 11 (citing Statement of Commissioner Jonathan S. Adelstein, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Twelfth Annual Report*, FCC 06-11, MB Docket No. 05-255 (rel. Mar. 3, 2006) ("Adelstein Statement") at 2). Commissioner Adelstein said nothing of the kind. The Commissioner's statement does not pertain to wireless or 3G and comments positively on video competition trends. The full statement is: "Vast new distribution networks promise to limit the ability of any vertically integrated conglomerates from imposing an economic, cultural or political agenda on a public with few alternative choices." Adelstein Statement at 2.

with the public interest and *not* harmful to competition. Accordingly Leap's call for re-imposition of the spectrum cap, even on a one-time, auction-specific basis, should be rejected.

I. LEAP'S SPECTRUM AGGREGATION LIMIT PROPOSAL SHOULD BE DISMISSED AS PROCEDURALLY DEFECTIVE.

The Further Notice is limited in scope and not the appropriate forum for belated reconsideration of the Commission's spectrum cap decision and other long closed proceedings. Leap argues that the DE program will be undermined if it is used by the large carriers "to enhance their already large spectrum holdings"[7] and that an AWS spectrum cap will address the problem.[8] As an initial matter, Leap's concern attributes DE spectrum holdings to potential large carrier partners, ignoring that – under existing DE rules – a strategic partner cannot control a DE. If Leap is of the view that existing rules require strengthening, or are not being enforced, it should focus its attention there.[9] But the relief Leap requests – re-imposition of the spectrum cap – is far more sweeping and, even in Leap's recounting of the facts, untimely.

Instead of focusing on the issues presented in the Further Notice, Leap seeks relief that amounts to untimely reconsideration of a panoply of proceedings. In proposing re-imposition of a spectrum cap, including the application of FCC Rule 20.6[10] – a rule that is no longer in effect – Leap seeks reconsideration of the Commission's 2001 decision to sunset the spectrum cap.[11] But the deadline for reconsideration of that order passed long ago. Leap hopes to overturn the

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[7] Leap comments at 3.

[8] *Id.* at 4.

[9] *See* Verizon Wireless comments at 2-3.

[10] Leap comments at 6.

[11] *See* 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Service, *Report and Order*, FCC 01-328, WT Docket No. 01-14 (rel. Nov. 18, 2001) ("Spectrum Cap Removal Order").

Commission's 2003 decision declining to adopt spectrum aggregation limits for the AWS Auction.[12] The order disposing of *timely* petitions in that docket issued in August 2005.[13] Other elements of Leap's comments essentially seek imposition of post-hoc conditions on long-consummated mergers.[14] The Commission should not take such proposals seriously. If Leap wishes to initiate a proceeding considering spectrum aggregation limits, the agency's rules provide procedures for doing so. However, having missed all applicable deadlines for advancing its proposal in appropriate dockets, the Commission should summarily reject Leap's efforts to have it considered now, in the eleventh hour before a major auction.

II. LEAP FAILS TO SHOW A CHANGE IN THE COMPETITIVE CONDITIONS WHICH FORMED THE BASIS FOR SUNSET OF THE SPECTRUM CAP.

Leap's proposal for a one-time spectrum cap applicable to the AWS Auction ignores the Commission's grounds for sunset of the spectrum cap – vigorous competition in the CMRS market[15] – without showing those conditions have changed. As Verizon Wireless showed in its opening comments, the 2005 CMRS Competition Report and recent merger decisions are recent and consistent affirmations of a competitive CMRS marketplace.[16] Leap attempts to bolster

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[12] Leap comments at 4 (citing Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Report and Order*, FCC 03-251, WT Docket No. 02-353 (rel. Nov. 25, 2003) at ¶ 67).

[13] Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Order on Reconsideration*, FCC 05-149, WT Docket No. 02-353 (rel. Aug. 15, 2005).

[14] *See* Leap comments at 9 (suggesting that discussion of the competitive impact of access to AWS spectrum in various wireless merger orders supports an *ex ante* spectrum aggregation limit applicable to the AWS auction); *see also* Section III, *infra*.

[15] *See* Spectrum Cap Removal Order at ¶ 50 ("We are persuaded that competition is now robust enough in CMRS markets that it is no longer appropriate to impose overbroad, *a priori* limits on spectrum aggregation that may prevent transactions that are in the public interest.")

[16] *See* Verizon Wireless comments at 6-7.

Council Tree's arguments to the contrary,[17] that the wireless market is excessively concentrated, by offering two pieces of "new" evidence that provide no new insight on the state of CMRS competition, much less a rebuttal of recent FCC precedents.

Leap relies on its ERS Report, filed in another proceeding, to show that "nationwide carriers' relative share of the CMRS market, as compared to regional carriers, is steadily increasing."[18] Leap also argues that, after the Sprint-Nextel transaction, the nationwide carriers will have more subscribers than the regional, small and rural carriers combined.[19] Neither finding, if true, demonstrates the need for a spectrum aggregation limit. Leap's argument conflates the FCC's legitimate interest in protecting *competition* with an interest in protecting *competitors*. Without additional information about the number of competitors in a particular market and their market shares, it is not even the beginning of a competitive analysis.[20] Even if such evidence and arguments were appropriate to raise here, which they are not, the Commission must reject calls for re-imposition of the spectrum cap, even on a one-time basis, that fail to show any change in the competitive conditions that justified the cap's elimination.

The Commission should also note that Leap's assertions about a supposed lack of wireless competition stand in direct conflict with its own position before the California Public Utilties Commission (CPUC). Over the past two years, Leap, through its subsidiary Cricket

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[17] Council Tree's competitive case for a DE eligibility restriction is based on a single data point. *See* Verizon Wireless comments at 11.

[18] Leap comments at 7 (citing "Wholesale Pricing Methods of Nationwide Carriers Providing Commercial Mobile Radio Service: An Economic Analysis" (November 2005) ("ERS Report") at 5).

[19] *Id.* at 7-8.

[20] Council Tree makes the same error, offering a single statistic about the percentage of subscribers served by the large carriers as a substitute for competitive analysis. *See* Verizon Wireless comments at 11.

Communications, Inc., repeatedly joined other wireless carriers in arguing that no new CPUC rules were needed, because consumers were protected by market forces in the vigorously competitive wireless industry. For example, Cricket's joint comments with other carriers in March 2005 stated, "A good part of the explosion in wireless usage must be credited to the high degree of competition within the wireless market, and the comcomitant benefits such competition confers upon consumers. ... Moreover, the high level of competition in the wireless industry continues to drive the creation and marketing of new and innovative wireless products."[21] Cricket joined other wireless carriers in filing similar comments throughout the CPUC's docket, which consistently pointed to strong wireless competition as driving benefits to consumers. As best as Verizon Wireless can determine, however, neither Cricket nor Leap ever retracted their position before the California Commission that the wireless industry is vigorously competitive.

III. LEAP MISCONSTRUES RECENT WIRELESS MERGER PRECEDENTS IN A FAILED ATTEMPT TO DEMONSTRATE CONCENTRATION IN THE CMRS MARKET.

Contrary to Leap's claim, the Commission's recent wireless merger orders support, rather than undermine, the determination that the CMRS market is vigorously competitive. To reach its conclusion, Leap misrepresents or misconstrues several Commission statements. For example, Leap asserts that in seven markets the impact of the Cingular-AT&T Wireless merger was to reduce the number of competitors from three to two.[22] But Leap then cites the portion of the

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[21] Comments of Cingular Wireless, LLC, Cricket Communications, Inc., Nextel of California Inc., Omnipoint Communications, Inc., Sprint Telephony PCS, L.P., Sprint Spectrum, L.P., Verizon Wireless and CTIA, on Assigned Commissioner's Ruling, CPUC Docket 00-02-004, March 25, 2006, at 2-3.

[22] Leap comments at 8.

order that is the Commission's reasoning for ordering divestitures in these markets. As the Commission notes, "in each case we find competitive harm and *impose a remedy.*"[23] Specifically, the Commission ordered an operating unit divestiture depriving the merged firm of the assets, customers, and spectrum in question and making them available to a third, rival carrier.[24] Leap also notes that the agency had competitive concerns about another twenty markets.[25] But the Commission imposed divestitures in these markets as well.[26] Indeed, the agency conditioned its approval of the merger on these divestitures, which it found sufficient to remedy any competitive harm and ensure that the transaction served the public interest.[27]

Leap notes that the Sprint-Nextel merger reduced the number of nationwide carriers from five to four,[28] but does not rebut the Commission's finding, after a fact-intensive analysis of

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[23] Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion & Order*, FCC 04-255, 19 FCC Rcd. 21522 (rel. Oct. 26, 2004) ("Cingular-AWS Order") at ¶ 193 (emphasis added).

[24] Cingular-AWS Order at ¶ 254. Leap makes the same error in stating that the Commission found the ALLTEL-Western Wireless merger reduced competition in a number of markets. *See* Leap comments at 8-9. The cited portion of the ALLTEL-Western Wireless Order is a comment on the state of competition if the Commission did not adopt divestitures that were, in fact, adopted. *See* Applications of Western Wireless Corporation and ALLTEL Corporation for Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, FCC 05-138, 20 FCC Rcd. 13053 (rel. July 19, 2005) ("ALLTEL/Western Wireless Order") at ¶ 160 ("We conclude that the conditions set forth below alter the public interest balance of the proposed transaction by mitigating the potential public interest harms. Accordingly, with the conditions we adopt in this Order . . . we find that the Applicants have demonstrated that the proposed transfer of licenses would serve the public interest.")

[25] Leap comments at 8.

[26] Cingular-AWS Order ¶¶ 254 and 265.

[27] *Id.* at ¶ 269.

[28] *Id.* at 8.

competitive conditions in potentially affected markets, that – even with no divestitures – the combination did not result in competitive harm and, in fact, served the public interest.[29]

Leap wrongly suggests that non-participation by the large carriers in the AWS auction was a condition of the merger approvals, and that absent an *ex ante* spectrum aggregation limit, the Commission will have "undercut one of the central underpinnings of approving these combinations."[30] When the Commission decides to impose a condition, it knows how to do so. The Commission did not condition its approval of the cited wireless mergers on any plan to impose spectrum aggregation limits.

Finally, Leap also misconstrues the agency's discussion of its establishment of a new analytical framework for competitive review with *findings* regarding the state of competition. In order to demonstrate concentration in the CMRS market warranting a spectrum aggregation limit, Leap notes that "[a]bsent regulatory intervention" the Cingular-AT&T Wireless merger would have "led the post-merger entity to hold more than one-third of the available spectrum . . . in some geographic areas."[31] The accompanying citation, however, is to a discussion of how spectrum should be used in the first level of competitive review (the so-called "initial screen"). In other words, the passage is not a Commission finding that Cingular's spectrum holdings are a competitive concern, but part of a discussion of how to conduct a competitive review.

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[29] Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, FCC 05-148, 20 FCC Rcd. 13967 (rel. Aug. 8, 2005) ("Sprint/Nextel Order") at ¶ 184.

[30] Leap comments at 9.

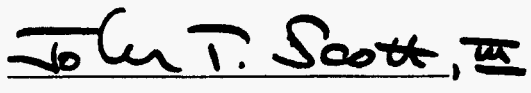
[31] Leap comments at 8 (citing Cingular-AWS Order at ¶ 109).

III. CONCLUSION

Verizon Wireless strongly urges the Commission to reject Leap's proposal to impose a spectrum aggregation limit to the AWS Auction. The proposal is procedurally defective and should be dismissed on that basis alone. In addition, the proposal seeks reintroduction of the spectrum cap, on a one-time basis, without any showing that the competitive conditions that justified the cap's removal have changed. Not only does the analysis not justify reinstating a spectrum cap, it is based on misrepresentations of prior Commission decisions.

Respectfully submitted,

VERIZON WIRELESS

By: 

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